

NOTICE: Summary decisions issued by the Appeals Court pursuant to its rule 1:28, as amended by 73 Mass. App. Ct. 1001 (2009), are primarily directed to the parties and, therefore, may not fully address the facts of the case or the panel's decisional rationale. Moreover, such decisions are not circulated to the entire court and, therefore, represent only the views of the panel that decided the case. A summary decision pursuant to rule 1:28 issued after February 25, 2008, may be cited for its persuasive value but, because of the limitations noted above, not as binding precedent. See Chace v. Curran, 71 Mass. App. Ct. 258, 260 n.4 (2008).

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

18-P-1112

ADOPTION OF HERMIONE.<sup>1</sup>

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

After a trial, a Juvenile Court judge found the father unfit to parent his daughter, Hermione, terminated his parental rights, and denied his motion for a new trial without a hearing. In this consolidated appeal, the father asserts that (1) his trial counsel was so prejudicially ineffective that counsel's deficiencies amounted to structural error; (2) the Department of Children and Families (DCF) violated his due process rights by failing to provide him with adequate services and to conform to its obligations under the relevant regulations; and (3) the judge should not have denied his motion for a new trial (premised on ineffective assistance of counsel) without an evidentiary hearing. We affirm.

Discussion. 1. Ineffective assistance. To prevail on his ineffective assistance of counsel claim, the father must establish that "the 'behavior of counsel [fell] measurably below

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<sup>1</sup> A pseudonym.

that which might be expected from an ordinary fallible lawyer' and . . . has likely deprived [him] of an otherwise available, substantial ground of defence.'" Care & Protection of Stephen, 401 Mass. 144, 149 (1987), quoting Commonwealth v. Saferian, 366 Mass. 89, 96 (1974). "[P]rejudice is not shown if there is overwhelming evidence of unfitness." Adoption of Azziza, 77 Mass. App. Ct. 363, 368 (2010).

Here, the father has a long history of violence and criminality. He violently abused the mother when they were together. He also has been convicted three times for assault and battery on a police officer and assault by means of a dangerous weapon, and twice for armed robbery, and, while the father's criminal history alone does not make him unfit, his history of repeated incarcerations is predictive of his future ability to provide a stable home for the child. See Adoption of Serge, 52 Mass. App. Ct. 1, 8 (2001) (physical unavailability from incarceration relevant in determining fitness). In this case, the father has been incarcerated for the child's entire life. At the time of briefing in this case, he was in pretrial detention awaiting trial on charges of violent crimes, including murder. He has never met the child, and while the father claims to have rejected prison visits for the sake of the child, the fact remains that the father does not have a relationship with her and can provide no home or financial support for her. Nor

is there evidence that the father's circumstances are likely to change in the near future. The timing of his release from prison, whether he is acquitted of both of the serious criminal charges pending against him or on completion of any sentence imposed after conviction, is at best unpredictable. See id. Accordingly, we conclude that the evidence of the father's unfitness was overwhelming, such that even if we were to find fault with either counsel's failure to visit and consult with the father before trial or counsel's performance during trial, the father has not shown that counsel's performance "deprived [him] of an otherwise available, substantial ground of defence." Care & Protection of Stephen, 401 Mass. at 149, quoting Saferian, 366 Mass. at 96.<sup>2</sup>

2. Violation of due process by DCF. The father next contends that DCF violated his due process rights by not identifying and providing him with services or meeting with him more than twice. Because the father cites no authority to

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<sup>2</sup> The father also contends that counsel's omissions were so numerous that they amount to constructive denial of counsel. We disagree. Constructive denial of counsel occurs when counsel has a conflict of interests, Commonwealth v. Mosher, 455 Mass. 811, 819 (2010); is completely unprepared for the entire trial, Commonwealth v. Valentin, 470 Mass. 186, 197 (2014); or is sleeping or absent, Commonwealth v. Lacoy, 90 Mass. App. Ct. 427, 440 n.20 (2016). None of these occurred here. Rather, counsel cross-examined witnesses, was able to effectively get damaging evidence excluded from trial, made efforts to reach out to the father's witness, and obtained a continuance of the trial to give the witness another chance to appear.

support this contention, he has waived it. Kellogg v. Board of Registration in Med., 461 Mass. 1001, 1003 (2011).

Even if we were to address this issue, the father would not prevail. "[A] parent must raise a claim of inadequate services in a timely manner so that reasonable accommodations may be made." Adoption of Gregory, 434 Mass. 117, 124 (2001). The father did not do so.<sup>3</sup>

3. Denial of motion for new trial without a hearing. The father lastly contends that the judge erred in denying his motion for a new trial without an evidentiary hearing. We disagree.

"A judge's denial of such a [Mass. R. Civ. P.] 60(b)[, 365 Mass. 828 (1974),] motion is within her discretion and is entitled to great deference by a reviewing court." Adoption of Gillian, 63 Mass. App. Ct. 398, 411 (2005). We give special deference to the decision of a judge who, as here, was also the trial judge. Commonwealth v. Figueroa, 422 Mass. 72, 77 (1996). Further, where materials attached to a rule 60 (b) motion show unfitness persists, as it did here, no evidentiary hearing is necessary. See Adoption of Gillian, supra at 411-412.

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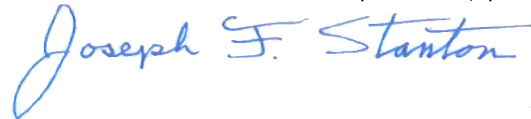
<sup>3</sup> Notably, even assuming without deciding that trial counsel's failure to compel DCF to provide adequate services to the father was ineffective, as discussed earlier, any such shortcomings did not prejudice the father given the overwhelming evidence of his unfitness.

Here, many of the assertions in the father's affidavit accompanying the motion, such as trial counsel's failure to discuss the case with the father, contradict the record and events that played out in front of the judge. Moreover, even if all of the father's assertions were true, the evidence of his unfitness was overwhelming and, therefore, cannot support a determination that he was prejudiced by trial counsel's claimed poor performance. Accordingly, we discern no abuse of discretion.

Conclusion. The decree and the order denying the father's motion for new trial are affirmed.

So ordered.

By the Court (Green, C.J.,  
Maldonado & Hand, JJ.<sup>4</sup>),



Clerk

Entered: August 8, 2019.

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<sup>4</sup> The panelists are listed in order of seniority.